

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYON LEE BAKER,

Defendant and Appellant.

C076653

(Super. Ct. No. P13CRF0369)

Defendant Bryon Lee Baker pleaded no contest to charges of animal cruelty (Pen. Code, § 597, subd. (a)),¹ attempted grand theft (§ 664/487, subd. (a)), and assault (§ 245, subd. (a)(4)). The trial court sentenced him to an aggregate term of seven years eight months in state prison and ordered him to pay \$25,141 in restitution directly to his victim, Christine Hightower. On appeal, defendant contends the bulk of the trial court's order for

¹ Undesignated statutory references are to the Penal Code.

restitution is not supported either by sufficient evidence or a rational basis. Finding no error, we affirm the order of the court.

BACKGROUND

On January 30, 2013, Ms. Hightower woke to find her Arabian gelding Trumpet missing from his stall in her six-stall barn. After searching her property, Ms. Hightower found Trumpet's bloody body in a nearby cemetery. Defendant had taken Trumpet from his stall, brought him to the cemetery, and disemboweled him.

Following defendant's conviction, the trial court presided over a contested restitution hearing to determine the amount of restitution defendant would pay to Ms. Hightower. Ms. Hightower testified that she purchased Trumpet in 1983 for \$14,000. For several years, Ms. Hightower had shown Trumpet in equine competitions; she retired him from competition in 2011 and began using Trumpet for horseback-riding lessons. She estimated Trumpet's value at the time of his death to be \$3,500.

Using Trumpet, Ms. Hightower's horseback-riding lessons "really took off."² Trumpet loved people and he was good with kids. As a result, in 2012 Trumpet was booked for riding lessons every Saturday and Sunday, and his lessons were booked out three months in advance. In December 2013 Trumpet's lessons generated \$1,740 for Ms. Hightower, enough to cover the hay and feed for all her other animals. Ms. Hightower testified that Trumpet would have been able to continue these lessons for another seven to 10 years had defendant not killed him.

In addition to giving horseback-riding lessons, Ms. Hightower used her ranch to board other people's horses. Following Trumpet's death, two of those people removed their horses. This cost Ms. Hightower \$750 each month for a five-month period.

² Ms. Hightower had a pony she also used for riding lessons but offered no testimony about the income generated by that pony or whether that pony could take over Trumpet's lessons.

Ms. Hightower had to pay an equipment company \$725 to remove Trumpet's remains from the cemetery and bury him. She also paid a veterinarian \$480 for an emergency examination of Trumpet at the scene. She then installed a security system at her ranch, which cost her an additional \$2,897.

The trial court agreed defendant should reimburse Ms. Hightower \$4,741 for the value of the horse as well as the vet and burial bills, but refused the cost of the security system or payments for any psychological harm done to Ms. Hightower. The court found Ms. Hightower had established that Trumpet provided her with an income of \$1,700 a month, carried that amount forward for 12 months, and ordered defendant to pay to Ms. Hightower \$20,400 for lost income. In sum, the court ordered defendant to pay \$25,141 in restitution to Ms. Hightower. Defendant appeals from that order.

DISCUSSION

On appeal, defendant contends there is neither sufficient evidence nor a rational basis for ordering him to pay to Ms. Hightower 12 months of income lost because Trumpet can no longer be used for horseback-riding lessons.³ We disagree.

A. Applicable Legal Principles

1. Standard of Review

The standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) Generally speaking, restitution awards are vested in the trial court's discretion and will be disturbed on appeal only where an abuse of discretion appears. (*People v. Fortune* (2005) 129 Cal.App.4th 790, 794.) “ ‘When there is a

³ Defendant initially claimed the trial court erred in ordering him to pay \$4,741 in restitution for “expenses associated with damaged/lost property.” In his reply brief, however, he concedes the issue is forfeited because he failed to raise his objection in the trial court.

factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.’ ” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 499.)

2. *The Victims’ Bill of Rights*

Article I, section 28 of the California Constitution, as amended by Proposition 9, the Victims’ Bill of Rights Act of 2008, known as Marsy’s Law, provides for a broad spectrum of victims’ rights, including restitution. Article I, section 28, subdivision (b)(13) of the California Constitution states: “(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

“(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.”

To implement the Victims’ Bill of Rights, the Legislature enacted section 1202.4. Under section 1202.4, the court must order direct victim restitution in “every case in which a victim has suffered economic loss as a result of the defendant’s conduct.” (§ 1202.4, subd. (f); see also § 1202.4, subd. (a)(1).) The court “shall require” the defendant to make restitution “based on the amount of loss claimed by the victim . . . or any other showing to the court. . . . The court shall order full restitution” (§ 1202.4, subd. (f).)

Section 1202.4, subdivision (f)(3) provides that “[t]o the extent possible, the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct, including but not limited to,” categories of losses listed in the statute. The statutory list of economic losses that may be recovered as victim restitution, however, is not exclusive. (*People v. Thygesen* (1999) 69 Cal.App.4th 988,

994 (*Thygesen*).) Loss of use, though not included in the statutory list, is an “economic loss” under the restitution statute. (*Id.* at p. 995.)

B. Analysis

Ms. Hightower testified that in his last month alive, Trumpet generated \$1,700 through horseback-riding lessons, and had he not been killed by defendant, Trumpet would have been able to continue to provide the same number of lessons every month for another seven to 10 years. She also testified that Trumpet’s lessons were booked out for three months. Defendant offered no contradictory evidence. This is more than sufficient evidence to support the trial court’s order.

Defendant argues Ms. Hightower’s restitution for “loss of use” should be limited to “the reasonable amount of time necessary to replace [Trumpet].” Defendant “submits” that 12 months is “an excessive period of time” and proposes one to three months as a more “reasonable” period of time. He relies on *Thygesen* to support his argument. (*Thygesen, supra*, 69 Cal.App.4th 988.) We are not persuaded.

In *Thygesen*, the court found that in calculating “loss of use” with regard to a stolen cement mixer, among other factors, the trial court would “have to determine the length of time it took (or reasonably should have taken) the victim to replace the stolen item.” (*Thygesen, supra*, 69 Cal.App.4th at p. 995.) A cement mixer is not a horse. With minimal effort and in fairly short order, we imagine, a cement mixer that operates as well as one taken from a victim can be found. The same cannot be said for a horse.

Trumpet lived with Ms. Hightower for 30 years. He liked people, he was good with kids, and he was booked three months in advance for riding lessons. There is no evidence in the record that Ms. Hightower could have found a horse with a disposition and constitution similar to Trumpet’s in less than one year. The only evidence was that Trumpet could have continued to generate \$1,700 a month for another seven to 10 years. Accordingly, on this record, we find the trial court’s order that defendant pay Ms. Hightower her lost income for only 12 months to be not only rational but charitable.

Defendant also claims “there is no evidence that Ms. Hightower intended or wanted to continue riding lessons,” and no evidence “as to how much the cost of hay and feed was.” Ms. Hightower presented prima facie evidence of her loss: the amount Trumpet generated each month and how long he could be expected to continue at that rate. The burden then shifted to defendant to demonstrate otherwise. (*People v. Prosser* (2007) 157 Cal.App.4th 682, 691.) This missing evidence is therefore defendant’s failure, not Ms. Hightower’s, and his claim fails.

DISPOSITION

The order of the trial court is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

ROBIE, J.